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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL PENNEL, JR., Case No. 5:16cv02889
Plaintiff, Akron, Ohio
Wednesday, November 30, 2016

vs.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, ET AL.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

TELEPHONE CONFERENCE

APPEARANCES:

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EXHIBIT 4

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3 THE COURT: All right. Counsel, this is Judge
4 Adams. Can you all hear me?

14:15:01 5 For the record -- we will conduct this on the
6 record. For the record, the court has before it today Case
7 Number 5:16cv2889. The case is captioned Michael Pennel,
8 Jr., versus the National Football League Players
9 Association, the National Football League and the National
14:15:17 10 Football League Management Council.

11 We're here today for a conference to discuss an
12 outstanding motion for a temporary restraining order, as
13 well as a preliminary and permanent injunction, which is
14 sought by the plaintiff in this matter.

14:15:30 15 Before we go further, I would ask counsel to
16 identify yourselves and who's appearing for the record as we
17 are conducting this conference by telephone, and I would ask
18 when you are called upon to speak, that you identify
19 yourself before speaking for the benefit of the court
14:15:47 20 reporter.

21 Counsel, on behalf of Mr. Pennel.

22 MR. ZASHIN: Thank you, Your Honor. On behalf of
23 Mike Pennel, Stephen Zashin and Pat Hoban from Zashin &
24 Rich.

14:16:00 25 THE COURT: Thank you. On behalf of the National

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1 Football League Players Association?

2 MR. WARREN: Yes, Your Honor. Tom Warren from
3 Baker & Hostetler and David Greenspan from Winston & Strawn.

4 THE COURT: And the National Football League?

14:16:15 5 MR. OLISS: Good afternoon, Your Honor. This is
6 Philip Oliss from Squire Patton Boggs and with me is Dan
7 Nash and Stacey Eisenstein from Akin Gump.

8 THE COURT: On behalf of the Football League
9 Management Council?

14:16:31 10 MR. OLISS: Your Honor, Phil Oliss, again, the
11 same.

12 THE COURT: All right. Thank you. I have read
13 the pleadings filed on behalf of the plaintiff. I have not
14 had considerable amount of time to read the position
14:16:43 15 statements filed by the defendants which were submitted here
16 a matter of minutes ago. So I don't have a -- haven't
17 thoroughly reviewed them, but I have some general idea as to
18 the ideas.

19 Counsel for Mr. Pennel, why don't you give me an
14:16:58 20 overview of your client's claims and the basis of your
21 request here for the TRO? That's really the most pressing
22 matter at this time.

23 MR. ZASHIN: Thank you, Your Honor. On behalf of
24 Mr. Pennel, he has filed this action in this court seeking a
14:17:15 25 temporary restraining order, a preliminary and permanent

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1 selected by the NFL and the NFLPA as the agreement provides.

2 Plaintiff is asking the court to require that
3 arbitrator to hear the proceedings as opposed to the notice
4 arbitrator, which is what the collective bargaining
14:26:26 5 agreement provides.

6 THE COURT: Can I interrupt for a moment, sir?

7 I know what he's asking me to do, with all due
8 respect. I am just a bit curious about whether or not the
9 Players Association and the NFL are in full compliance with
14:26:40 10 the terms of the policy?

11 The points that he raises with regard to the
12 arbitration provision and the allegation that there is some
13 sort of side deal here, can you respond to that?

14 I am more interested in specifically, again, how
14:26:57 15 you would respond to the substance of his arguments. I know
16 what he's asking for is extraordinary, but I am more curious
17 about whether or not you have fully complied with both the
18 Players Association and the NFL with exactly what the terms
19 of the policy are.

14:27:14 20 MR. GREENSPAN: Okay. So, Your Honor, let me try
21 to answer that as best I can. You are familiar with our
22 position on the relief, as well as the fact that the case is
23 premature. The plaintiff has not exhausted his arbitration
24 and NFLPA and CBA procedures.

14:27:32 25 With respect to what they characterize as a lapse

1 in the policy, there is no lapse in the policy. There is a
2 jointly appointed neutral arbitrator who is available on the
3 hearing date, which is automatically scheduled pursuant to
4 the CBA procedure. That arbitrator, Mr. Carter, was
14:27:52 5 actually scheduled to cover the December 6 hearing date as
6 far back as May 2016 of this year. There is, in fact, a
7 notice arbitrator, that is Mr. Wong. Mr. Wong, in
8 consultation with Mr. Carter, as the CBA requires, made sure
9 that one of them would cover every Tuesday during the NFL
14:28:16 10 season, and that was set sometime ago. It just so happens
11 that Mr. Pennel's hearing falls on a date that Mr. Carter is
12 supposed to cover.

13 In terms of the fact that there are two, and not
14 three or more arbitrators, that is correct. It is my
14:28:31 15 understanding that one or two years ago, I'm not sure
16 exactly when, the parties, by mutual consent -- and I would
17 point out that in the policy, Section 1.18 modification
18 merely requires mutual consent of the parties. The parties
19 determined that two arbitrators were sufficient to do the
14:28:55 20 work of hearing these drug policy appeals for a very simple
21 reason.

22 There are not many of these drug policy appeals,
23 and the parties concluded that it did not make sense to
24 employ a third arbitrator to spread out the limited number
14:29:10 25 of appeals between three arbitrators and instead, there are

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1 two arbitrators. They are neutrals who hear these appeals
2 and have great familiarity with the issues because they hear
3 more of the limited number of appeals that have been filed.

4 THE COURT: Was the modification reduced to
14:29:26 5 writing?

6 MR. GREENSPAN: I don't know, Your Honor. I have
7 not seen --

8 THE COURT: It's not been reduced to writing? Was
9 it submitted to the union's leadership for their -- I assume
14:29:37 10 the union itself has some sort of committee or a membership
11 might have a voice in this, this modification, given the
12 stakes at issue here for players?

13 MR. GREENSPAN: Your Honor, I don't know the
14 answer, in terms of the internal union logistics. The union
14:29:59 15 has a board of player representatives. It's sort of
16 equivalent to the board of directors of the union. I do not
17 know whether this issue was raised to them. I can only tell
18 Your Honor that this status quo has existed both under the
19 drug policy and the performance enhancing drug policy for a
14:30:22 20 couple of years.

21 There have been plenty of appeals. No player has
22 ever raised this issue, but to the extent it hasn't reached
23 the board -- the board of player representatives, it's
24 because none of its membership ever expressed any concern.

14:30:38 25 In fact, Mr. Zashin represents a client who was

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1 subject to the performance enhancing drug policy and went
2 through these very procedures just one month ago and they
3 were fully aware there were two arbitrators and not three.

4 As far as I know, Your Honor, no objection was
14:30:54 5 raised. I believe the reason we're here today is because
6 the arbitrator, who denied the appeal that Mr. Zashin was
7 involved in several weeks ago, has effectively been randomly
8 assigned to cover the appeal upcoming on December 6.

9 There is no allegation that this arbitrator, who
14:31:13 10 is a world renowned arbitrator, who has expertise in this
11 matter is biased, is in any way not going to hold a
12 fundamentally fair hearing. It appears that Mr. Zashin,
13 unhappy with the results in his prior proceedings before
14 that arbitrator, has now come into court despite working
14:31:36 15 through and living with those procedures a month ago, to now
16 ask for the extraordinary remedy of having the court appoint
17 an arbitrator, of having the court determine which
18 arbitrator would preside over that hearing.

19 THE COURT: I don't need to go there in terms of a
14:31:55 20 remedy. I don't want to get into the remedy issue yet. I
21 don't think I need to go there and decide whether or not I
22 am going to appoint an arbitrator, an independent arbitrator
23 myself.

24 But I am a bit concerned about this process that
14:32:15 25 you apparently have adopted that strikes me as inconsistent

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1 or contrary -- or a modification of what is clearly set
2 forth in the agreement between the NFL and the Players
3 Association, and how you would go about doing that without
4 some formalities, something in writing or something of that
14:32:38 5 effect, because, again, I think it's relatively clear,
6 there's certainly good argument that the implications for a
7 player, a suspension and the right to a fair hearing would
8 certainly caution the appropriate, again, formalities be
9 filed.

14:33:01 10 So I am a bit concerned about whether or not this,
11 again, this, if you want to call it a gentleman's agreement,
12 that no one has been able to tell me has been formalized,
13 agreed to in a formal fashion pursuant to the union's, I
14 assume, bylaws and what have you. The player certainly is
14:33:22 15 free to raise it. He may not have raised it before. Others
16 may not have raised it. They may not have been aware of it.

17 So I am troubled by that.

18 MR. GREENSPAN: So, Your Honor, I guess the first
19 thing I would say is in terms of following the required
14:33:38 20 formalities, I don't agree with plaintiff's premise that
21 they were not followed. When I looked at the policy last
22 night, what I found was a provision that says that
23 "Modification of the policy will require the mutual consent
24 of the parties."

14:33:56 25 Provisions like that usually specify writing. The

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1 C E R T I F I C A T E

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3 I certify that the foregoing is a correct transcript

4 from the record of proceedings in the above-entitled

5 matter.

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